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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 838

BERT F. DUESING,

Petitioner,

v.

STEWART L. UDALL,
Secretary of the Interior,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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December 21, 1965

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Bert F. Duesing petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The Opinion of the Court of Appeals of June 30, 1965 (App.1-9)[1] is reported at 350 F.2d 748.

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[1] "App." refers to the appendix to this petition. "JA" refers to the Joint Appendix filed in the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1965 (App. 10). A timely petition for Rehearing en banc was denied by the Court on September 23, 1965 (App. 10). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the discretionary authority in the issuance of oil and gas leases conferred on the Secretary of the Interior by Section 17 of the Mineral Leasing Act of February 25, 1920, as amended (30 U.S.C., 1958 ed., sec. 226), is so broad and far-reaching that he may override Section 1 of the Mineral Leasing Act (30 U.S.C., 1958 ed., sec. 181) which authorizes the issuance of leases for wildlife lands[2] and close to leasing by means of a regulation approved January 8, 1958, a vast area embracing 1,689 square miles in the southern half of the Kenai National Moose Range, Alaska, without the formality of a public land order as required by Executive Order No. 10355 (17 F.R. 4831).[2a]

2. Whether the rule making authority conferred on the Secretary by Section 32 of the Mineral Leasing Act (30 U.S.C., 1958 ed., sec. 189) authorizes the issuance of a regulation approved January 8, 1958, that flies in the face of the letter and purpose of the Act where the Secretary admits (a) that the statute does not prohibit leasing in the moose range, and (b) that he lacks authority under the Mineral Leasing Act to withdraw such lands from leasing.

STATUTES AND REGULATIONS INVOLVED

Section 1 of the Mineral Leasing Act of February 25, 1920, as amended by the Act of August 8, 1946, c. 916,

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[2] It was so held by this Court in *Udall v. Tallman*, 380 U.S. 1 (1965), at p. 4.

[2a] Left unresolved by this Court in *Tallman* at pp. 9-10.

sec. 1, 60 Stat. 950 (30 U.S.C., 1958 ed., sec. 181), provides, in pertinent part, as follows:

> Deposits of coal, phosphate, sodium, potassium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Appalachian Forest Act, and those in incorporated cities, towns, and villages and in national parks and monuments, those acquired under other Acts subsequent to February 25, 1920, and lands within the naval petroleum and oil-shale reserves, except as hereinafter provided, *shall* be subject to disposition in the form and manner provided by this Act to citizens of the United States * * * (Emphasis added.)

Section 17 of the Mineral Leasing Act of February 25, 1920, as amended by the Act of August 8, 1946, c. 916, sec. 3, 60 Stat. 951 (30 U.S.C., 1958 ed., sec. 226), provides, in pertinent part, as follows:

> Sec. 17. All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits may be leased by the Secretary of the Interior. * * * When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding.

Section 32 of the Mineral Leasing Act of February 25, 1920, c. 85, 41 Stat. 450 (30 U.S.C. 189) provides, in pertinent part, as follows:

> Sec. 32. That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations to do any and all things necessary to carry out and accomplish the purposes of this Act * * *

STATEMENT

On August 9, 1957, petitioner filed in the Anchorage, Alaska, land office of the Bureau of Land Management nine noncompetitive oil and gas lease offers, identified

by serial numbers Anchorage 036561 to 036569, inclusive, covering a total of 20,480 acres of public domain lands [the land in suit] in the Kenai National Moose Range on the Kenai Peninsula, Alaska. The lease offers were submitted in proper form for lands not within a known geological structure of a producing oil or gas field and were accompanied by the first year rentals of $5,120.00 and filing fees of $90.00 as required by the applicable statute and regulations. Respondent accepted the lease offers, rentals and filing fees. Issuance of leases then awaited the offers being reached for processing in their regular turn with other pending offers not pertinent here.[3] On the date petitioner filed the lease offers the controlling regulation then in force and effect was 43 CFR 192.9 approved December 6, 1955, Circular 1945. This regulation was promulgated by the Secretary pursuant to Section 32 of the Mineral Leasing Act of February 25, 1920, as amended (30 U.S.C. 189), and authorized the issuance of oil and gas leases covering the land in suit. Respondent admits that had this regulation remained in force and effect leases would have been issued to petitioner for the lands included in his offers (JA 38).

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[3] In a telegram dated August 21, 1957 (JA 13), to the Anchorage land office of the Bureau of Land Management petitioner inquired whether acceptance of the rental and filing fee checks meant that leases would be awarded and, if not, the approximate time when petitioner would be advised if he was successful in acquiring the acreage. The land office Manager replied on August 26, 1957 (JA 13) that acceptance of the checks did not necessarily mean that leases would be subsequently issued, that the issuance of leases is governed by Section 17 of the Mineral Leasing Act which requires that leases be issued to the first qualified applicant, that it would be several months before petitioner's offers would be reached for adjudication at which time leases would be authorized if it was found "that the applications are valid in all respects, that there are no intervening claims to the land and the above referenced offers are the first qualified applications."

However, some five months later on January 8, 1958, the Secretary issued a new regulation, designated as Circular 1990, which superseded the prior regulation Circular 1945. This regulation, which purported to be issued under the Respondent's rule making power conferred by Section 32 of the Mineral Leasing Act, suspended action on all pending lease offers theretofore filed, including petitioner's, for public lands in game ranges, coordination lands and Alaska wildlife areas and directed representatives of the Bureau of Land Management and the United States Fish and Wildlife Service to confer for the purpose of entering into an agreement specifying those lands which shall not be subject to oil and gas leasing. Such agreement was not to be effective until approved by the Secretary.

Based upon an agreement between the Bureau of Land Management and Fish and Wildlife Service approved by the Secretary on July 24, 1958 (JA 18), closing to oil and gas leasing the southern half of the Kenai National Moose Range, including the land in suit, petitioner's lease offers were rejected by two decisions of the Anchorage land office dated August 13, 1958, and August 20, 1958, on the ground that oil and gas activities would be incompatible with the management thereof for wildlife purposes.

On appeal to the Director, Bureau of Land Management, the Manager's decisions were affirmed on March 25, 1959 (JA 22-28). The Acting Director's decision completely ignored the principal issue in the case as to the Secretary's statutory authority to close to oil and gas leasing a large area of public domain land without the sanction of Congress and in the face of Section 1 of the Mineral Leasing Act of February 25, 1920, as amended (30 U.S.C. 181), which spells out the several categories of lands [4]

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[4] Section 1 of the Act excludes "lands acquired under the Act known as the Appalachian Forest Act, approved March 1, 1911 (36 Stat. 961), and those in incorporated cities, towns, and villages and in national parks and monuments, those acquired

(*Continued, next page*)

that are expressly excluded from the operation of the Act and which do not encompass wildlife areas. Instead, the Acting Director simply held that the determination whether or not to issue a lease lies within the discretion of the Secretary and that if he decides not to lease certain land, offers filed for such land must be rejected.

Petitioner then filed an appeal to the Secretary. On October 30, 1961, the Assistant Secretary of the Interior affirmed the Acting Director, Bureau of Land Management, and rendered a decision adverse to petitioner (JA 28-50). In this decision the Assistant Secretary held that the agreement of July 24, 1958, closing approximately half the Kenai National Moose Range to oil and gas leasing was not issued pursuant to the Secretary's authority to withdraw public lands but in the exercise of his discretionary authority in the issuance of leases. As in the case of the decision of the Acting Director, Bureau of Land Management, the Assistant Secretary also ignored in his decision the declared will of Congress expressed in Section 1 of the Mineral Leasing Act that all lands of the United States shall be subject to oil and gas leasing except those categories of lands expressly excluded by the Act itself. Not one word in the Assistant Secretary's decision is addressed to this fundamental issue which petitioner stressed in the administrative proceeding.

Petitioner, having exhausted the administrative remedy, brought timely suit in the United States District Court seeking judicial review of the Respondent's decision. Petitioner's motion for summary judgment was denied, Respondent's cross-motion was granted, and a judgment of dismissal was entered July 23, 1962, as modified July 25, 1962 (JA 58). The District Court held in its oral Opinion (JA 55-57) that "the Secretary of the Interior has dis-

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(Footnote 4, continued)
under other Acts subsequent to February 25, 1920, and lands within the naval petroleum and oil-shale reserves, except as hereinafter provided . . .," 41 Stat. 437-438 (1920), as amended by 60 Stat. 950 (1946), 30 U.S.C. § 181 (1958 ed.).

cretion to decide whether or not to lease any particular plot of land"; that "prior to any action being taken on the application, the Secretary changed his decision and announced that he would not lease the property in question"; that "His purpose in so doing is immaterial"; and that "The Secretary of the Interior, of course, as any other Government official, had a right to change his mind, unless, indeed, any vested rights had intervened. The fact is that no vested rights intervened here."

The petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit. In an Opinion dated June 30, 1965, the Circuit Court affirmed the District Court. In substance the Court of Appeals (at p. 751) agreed with the Secretary that stripped of all authority to withdraw the subject lands under his statutory withdrawal powers, which requires that withdrawals be reported to Congress, the Secretary would still have discretionary authority to refuse to issue leases where he thinks issuance would not be in the public interest and, further, that the Secretary's refusal to issue a lease "on a given tract" (see *Udall v. Tallman*, 380 U.S. 1) also encompasses the Secretary's right to make blanket rejection of lease offers on a large area of 1,689 square miles.

Not one word in the Opinions of the District Court (JA 55-57) and the Court of Appeals is addressed to Section 1 of the Mineral Leasing Act which in mandatory terms provides that except for certain categories of land therein expressly excluded all other lands of the United States, including wildlife areas, shall be subject to leasing. Nor do these Opinions take into consideration the impact of Section 1 on the exercise by the Secretary of the discretionary authority conferred on him by Section 17.

REASONS FOR GRANTING THE WRIT

I.

The Opinion of the Court of Appeals Conflicts With the Opinion of This Court in Udall v. Tallman.

The Opinion of the Court of Appeals in *Duesing v. Udall*, 350 F.2d 748 (1965), conflicts with the Opinion of this Court in *Udall v. Tallman*, 380 U.S. 1 (1965), in the following respects:

(a) In *Tallman* (at p. 4) this Court held that the Mineral Leasing Act conferred on the Secretary "discretion to refuse to issue any lease at all on a given tract" (emphasis added) thus clearly contemplating the exercise of discretion by the Secretary in acting on an individual offer to lease a given tract. In *Duesing* (at p. 751) the Court of Appeals held that the Secretary's discretionary authority went much further and also encompassed the right to issue a regulation which *per se* constituted a blanket refusal to issue leases on 1,689 square miles of the moose range — thus eliminating the exercise of any discretion at all by the Secretary in acting on an individual offer to lease a given tract.

(b) In *Tallman* (at pp. 9-10) this Court, in discussing Respondents' argument that the Secretary's 1955 regulation [5] is not probative as to the availability of the lands for leasing prior to 1955, pointed out that if the regulation had been intended to change the status of the moose range rather than merely imposing additional restrictions on leasing it is likely that the Secretary would have done so under a public land order in the manner directed by

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[5] Unlike the 1958 regulation, the 1955 regulation authorized the issuance of leases for lands in the southern half of the moose range.

the President's delegation.[6] This Court left open the question whether "a document not labeled a public land order could in legal effect constitute an exercise of that power" suggesting, however, that "it would have been a technique inappropriate for effecting a change of the Range's status." In *Duesing*, although the Secretary's 1958 regulation did change the southern half of the moose range from a leasing status to a non-leasing status, the Court of Appeals (at p. 751) upheld the Secretary's authority by means of the 1958 regulation to close 1,689 square miles to leasing without the necessity of issuing a public land order as the President's delegation clearly contemplated.

(c) In *Tallman* (at pp. 10-11) this Court stated that bills introduced in Congress early in 1956 to restrict oil and gas leasing in wildlife refuges were not reported on favorably by the House and Senate Committees thus supporting the Secretary's position of pre-existing authority to grant oil and gas leases in the Kenai National Moose Range — a view consistent with the legislative purpose of the Mineral Leasing Act. In *Duesing* (at p. 750) the Court of Appeals, although referring to the 1956 bills and noting the failure of Congress to restrict oil and gas leasing in wildlife refuges, nevertheless upheld the Secretary's blanket refusal by regulation to grant leases in the southern half of the moose range — an action inconsistent with the legislative purpose of the Mineral Leasing Act.

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[6] Executive Order No. 10355 of May 26, 1952 (17 F.R. 4831) delegated to the Secretary authority, by public land orders, "to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States in the continental United States or Alaska for public purposes, including the authority to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made." Moreover, the delegation order directed that "all orders issued by the Secretary of the Interior under the authority of this order shall be designated as public land orders and shall be submitted * * * for filing and for publication in the Federal Register." See *Udall v. Tallman*, supra, at p. 9.

II.

The Court of Appeals Is Wrong in Concluding That Tallman Controls Duesing.

In *Duesing* the Court of Appeals left no doubt that it regarded *Tallman* as controlling and decisive of the Secretary's discretionary authority to close the southern half of the Kenai National Moose Range to oil and gas leasing. In our view *Tallman* does not control the instant case. The issues are completely different. In *Tallman* this Court upheld the Secretary's authority to issue leases in the moose range and rejected the contention of the Tallman group that the 1941 Executive Order creating the moose range prohibited leasing. In the instant case the principal issue is whether the Secretary acted contrary to the statute and in excess of his lawful authority in closing the southern half of the moose range to leasing. To be sure, in *Tallman* (at p. 4) this Court recognized the broad power of the Secretary in the issuance of leases as well as his discretionary authority "to refuse to issue any lease at all on a given tract." But we submit that the Secretary's discretion to refuse to issue any lease on a given tract must in fact be exercised, not rubber-stamped, on each individual offer and must be reasonable and within the framework of Congressional policy as prescribed in the Mineral Leasing Act. It does not encompass the closing of more than one million acres of public lands to leasing by means of a regulation which is unauthorized by the rule making power of Section 32 of the Act.

III.

The Secretary's 1958 Regulation Transcends His Rule Making Power and Constitutes an Invalid and Improper Exercise of His Discretionary Authority in the Issuance of Oil and Gas Leases.

It is fundamental that the Secretary may not lawfully attempt to accomplish indirectly by a regulation what he finds himself, by his own admission (JA 37), unable to do directly by a formal order of withdrawal. We submit that the Secretary's 1958 regulation (JA 14-17) transcends his statutory rule making power and that the discretionary authority recognized by this Court in *Tallman* was never intended to confer on the Secretary blanket power, absolute and unlimited, to grant or deny a lease depending upon his whim or caprice. This is a novel and dangerous concept unprecedented since the era of former Secretary of the Interior Albert B. Fall. Upholding the Secretary's contention of absolute discretion would make his decisions immune from judicial review. It would not even serve any purpose to obtain judicial scrutiny of the 1958 regulation for if the Secretary has absolute discretion to grant or deny leases at will the validity or invalidity of the regulation would for all practical purposes be meaningless. This is bureaucracy at its worst. Yet this appears to be the sum and substance of the Secretary's position which has been upheld by the Court of Appeals.

The Secretary's assertion of absolute discretionary authority to close this large area to leasing comes despite admissions in his final administrative decision that "The Mineral Leasing Act does not prohibit leasing within a moose range" (JA 38) and that "To my knowledge he [referring to the Secretary] has never asserted that he had authority under the Mineral Leasing Act to withdraw land from leasing." (JA 37) In the face of these admissions the assertion by the Secretary of the right to close this large area of moose range lands to leasing through the guise of exercising his discretionary authority in the is-

suance of leases, rather than by a public land order as directed by Executive Order No. 10355, constitutes an obvious attempt to circumvent and defeat the clear intent of Congress expressed in Section 1 of the Mineral Leasing Act that such lands shall be subject to leasing. This flies in the face of the principle enunciated in *Seaton v. Texas Company*, 103 U.S. App. D.C. 163, 256 F.2d 718 (1958), in which the Court of Appeals for the District of Columbia said (at pp. 167-168):

> "There is a wide latitude available to the Secretary [of the Interior] in many situations, but he is bound by the statute. * * *
>
> "There is a difference also in the latitude the Secretary possesses depending upon whether the question is factual or legal. * * *"

In this posture, we turn to the source of the Secretary's rule making power. The controversial 1958 regulation purports to stem from the authority conferred on the Secretary by Section 32 of the Act (30 U.S.C. 189).[7] That section provides in pertinent part:

> "That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act * * *"

When petitioner filed his lease offers on August 9, 1957, the controlling regulation then in force and effect was Circular 1945 approved December 6, 1955. This regulation was issued pursuant to Section 32 of the Act and it is conceded by the Secretary that it authorized the issuance of leases for the land in suit (JA 38). Manifestly, the 1955 regulation when issued was necessary and proper and in conformity with the authority granted to the Secretary by Section 32 of the Mineral Leasing Act "to

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[7] See 22 F.R. 8088, notice of proposed rule making, which subsequently was adopted as the regulation approved January 8, 1958 (JA 14-17).

do any and all things necessary to carry out and accomplish the purposes of this Act."[8] The single purpose of the Act is aptly expressed in the title of the Act of February 25, 1920, as amended by the Act of August 8, 1946 (60 Stat. 950) which reads:

> "To amend the Mineral Leasing Act of February 25, 1920, as amended, *in order to promote the development of oil and gas on the public domain*, and for other purposes." (Emphasis added.)

Turning now to the 1958 regulation, when the Secretary decided to close the southern half of the Kenai Moose Range to leasing he was cognizant of his lack of power under the Mineral Leasing Act to withdraw the lands. Accordingly, he issued an amendatory regulation, Circular 1990 approved January 8, 1958, which superseded the earlier 1955 regulation Circular 1945. This is an amazing regulation. First, it gave as the source of its authority Section 32 of the Mineral Leasing Act, and second, it instructed representatives of the Bureau of Land Management and the Fish and Wildlife Service to get together and enter into an agreement specifying which areas were to be closed to leasing. A notice closing the southern half of the moose range to leasing followed on July 24, 1958 (JA 18). Here we find a paradox. Whereas Section 32 of the Mineral Leasing Act authorizes the Secretary to prescribe necessary rules and regulations to carry out the purpose of the Act, which is to promote oil and gas development, the Secretary used this same statutory authority to defeat the purpose of the Act by closing more than one million acres of public lands to oil and gas leasing. A more obvious example of an executive officer of Government attempting to usurp the legislative function

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[8] It is well settled that a valid regulation of the Interior Department has the force and effect of law and is binding on the Secretary while it is in effect. See *Chapman v. Sheridan-Wyoming Coal Co.*, 338 U.S. 621, 629 (1950); *United States ex rel Accardi v. Shaughnessy*, 347 U.S. 260, 265 (1954); *McKay v. Wahlenmaier*, 96 App. D.C. 313, 321, 226 F.2d 35, 43 (1955).

of making law is difficult to perceive. This regulation flies directly in the face of and is diametrically contrary to the declared purpose of the Act. It is clear to us that the 1958 regulation is inconsistent and in conflict with the statute and goes far beyond the proper exercise of the power of the Secretary to promulgate regulations which bear a reasonable relation to the purposes sought to be achieved by the Congress.[9] For a regulation to be proper, this Court in *Maryland Casualty Co. v. United States*, supra, has pronounced the rule to be as follows (at p. 349):

> "* * * It is settled by many recent decisions of this court that a regulation by a department of government, addressed to and *reasonably adapted to the enforcement of an act of Congress*, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision. *United States v. Grimaud*, 220 U.S. 506; *United States v. Birdsall*, 233 U.S. 223, 231; *United States v. Smull*, 236 U.S. 405, 409, 411; *United States v. Morehead*, 243 U.S. 607. * * *" (Emphasis added.)

Equally well settled is the doctrine that the power of an administrative officer to prescribe regulations does not carry with it the power to make law.[10] This Court has also indicated with clarity the kind of regulation that is improper and invalid. In *Manhattan General Equipment Co.*, supra, it said (at pp. 134-135):

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[9] *Maryland Casualty Co. v. United States*, 251 U.S. 342, 349 (1920); *United States v. Smull*, 236 U.S. 405, 409, 411 (1915); *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 69, 70 (1937); *International Ry. Co. v. Davidson*, 275 U.S. 506, 514 (1922).

[10] *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134, 135 (1936); *Miller v. United States*, 294 U.S. 435, 439, 440 (1935); *United States v. George*, 228 U.S. 14, 21 (1913); *United States v. Grimaud*, 220 U.S. 506, 517 (1911); *United States v. United Verde Copper Co.*, 196 U.S. 207, 215 (1905).

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. *A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. Lynch v. Tilden Produce Co.*, 256 U.S. 315, 320-322; *Miller v. United States*, 294 U.S. 435, 439-440, and cases cited. And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable. *International Ry. Co. v. Davidson*, 257 U.S. 506, 514. The original regulation as applied to a situation like that under review is both inconsistent with the statute and unreasonable." (Emphasis added.)

In *Procter & Gamble Co. v. Coe*, 68 App. D.C. 246, 96 F.2d 518 (1938), the Court of Appeals for the District of Columbia summarized the kind of executive action that is improper as follows (pp. 249-250):

> "The following tests have been used to uphold the exercise of judicial restraint upon executive action under valid laws: (1) Where an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully assuming to exercise the power of government * * * (2) where an officer attempts to enlarge his power, or to usurp power * * * (3) where his act is based upon a clear mistake of law * * * (4) where the action of the officer or administrative body is clearly beyond its power and in violation of the statute * * * (5) where an officer has acted, or threatens to act, in a capricious and arbitrary manner * * * (6) where the act of the officer, 'under any view that could be taken of the facts that were laid before him, was ultra vires, and beyond the scope of his authority * * *' "

The principles enunciated in the foregoing cases when applied to the instant case make it clear that the Secretary's 1958 regulation transcends the rule making power conferred on him by Section 32 of the Mineral Leasing Act and constitutes an improper exercise of his discretionary authority in the issuance of oil and gas leases.

IV.

The Agreement of July 24, 1958, Between the Bureau of Land Management and Fish and Wildlife Service Closing To Leasing the Southern Half of the Moose Range Was Approved by the Secretary Without Notice and a Public Hearing Which by Regulation Is a Necessary Prerequisite to Making a Withdrawal.

By indulging in the fiction that closing 1,689 square miles of the moose range to oil and gas leasing does not constitute a withdrawal but is merely an exercise of the Secretary's discretion in the issuance of leases pursuant to Section 17 of the Mineral Leasing Act, the Secretary sought to achieve a *fait accompli* without giving proper notice to the oil industry and holding a public hearing. The Secretary's regulation 43 CFR 295, approved August 12, 1957, Circular 1982, 22 F.R. 6613, provides for notice and a public hearing prior to making a withdrawal.[11] Moreover, by not referring to the closure as a withdrawal the Secretary also eliminated the necessity for reporting the withdrawal to Congress as required by the Pickett Act of June 25, 1910, 36 Stat. 847, 43 U.S.C., 1958 ed., sec. 143.[12] Thus, by a single stroke of the pen the Secretary dispensed with this dual requirement.

The Secretary in his administrative decision (JA 40) counters this argument by pointing to a public hearing which was held on December 9 and 10, 1957, on the pro-

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[11] 43 CFR 295, now renumbered 43 CFR 2311 (29 F.R. 4497) defines in Section 2311.0-5 the term "withdrawal or reservation" as meaning "withdrawal, reservation or restriction" (emphasis added). Thus, the restriction against oil and gas leasing in the Kenai National Moose Range is by the Secretary's own definition a "withdrawal or reservation."

[12] The Opinion of the Court of Appeals in *Duesing* (at p. 751) takes note of the reporting requirement of the Pickett Act.

posed 1958 regulation prior to its adoption on January 8, 1958, in which the public was put on notice that part or all of the Alaska wildlife areas might be closed to leasing. In *Duesing* (at p. 752) the Court of Appeals in effect sustained the Secretary's position that the hearings of December 9 and 10, 1957, which actually encompass the entire gamut of wildlife in continental United States and Alaska, constituted adequate notice of the closure agreement affecting the Kenai National Moose Range that was approved more than seven months later. We submit, however, that no prior notice was given or a public hearing held on the specific agreement approved July 24, 1958, which effectively closed to leasing 1,689 square miles in the southern half of the moose range. The oil industry and the public generally were entitled to notice and an opportunity to present their views as to whether the Kenai National Moose Range should be closed to leasing in part or all and, if in part, the precise portion thereof. The failure of the Secretary to give such notice and to hold a public hearing prior to the adoption of the July 24, 1958, agreement is in violation of the applicable regulation and invalidates the agreement. Apart from this, the Secretary's failure to designate as a withdrawal the closing of approximately half the moose range to leasing which is a "restriction" within the meaning of the definition contained in the regulation 43 CFR 295 (see footnote 11) also has the effect of invalidating the 1958 regulation.

V.

Legislation To Restrict Leasing in Wildlife Areas Failed.

The attempt in 1956 by legislation to restrict leasing in wildlife areas, including the Kenai National Moose Range, is set forth in *Udall v. Tallman*, supra, at pp. 10-12. This is significant because had the Secretary already possessed authority to withdraw or withhold wildlife lands from leasing, the introduction of bills in the Congress to

restrict such leasing would have been unnecessary. The bills, however, were not reported out favorably by the respective Committees of the House and the Senate and the attempt to legislate on the subject failed. This history is explained in *Tallman* as follows (at pp. 10-11):

> "When bills were introduced in Congress early in 1956 to restrict oil and gas leasing in wildlife refuges, the House Committee on Merchant Marine and Fisheries and the subcommittee on Merchant Marine and Fisheries of the Senate Committee on Interstate and Foreign Commerce held extensive hearings thereon. The bills as introduced only forbade the Secretary to 'dispose of' lands in wildlife refuges, and the question arose during the hearings whether that language would apply to the issuance of oil and gas leases. A representative of the Department asserted, without contradiction, that the granting of an oil and gas lease was not a 'disposition' and would not be affected by the language as proposed. Hearings before the House Committee on Merchant Marine and Fisheries on H.R. 5306, etc., 84th Cong., 2d Sess., p. 98. An amendment was accordingly proposed specifically restricting oil and gas leasing. Neither committee reported favorably on the bills. * * *"

There can be no doubt that in closing approximately one million acres in the Kenai National Moose Range to leasing by the 1958 amendatory regulation the Secretary sought to do under his rule making power what the bills introduced in Congress in 1956 failed to accomplish. In an analogous case this Court struck down as invalid a regulation of the Federal Communications Commission. In *Federal Communications Commission v. American Broadcasting Co., Inc.*, 347 U.S. 284 (1954), the Commission sought unsuccessfully to have Congress amend the existing law to stop give-away programs on radio and television. The Commission then prescribed agency regulations to accomplish the same objective. Declaring the agency regulations invalid, this Court said (at p. 296):

> "* * * The Commission now seeks to accomplish the same result through agency regulations. In doing

> so, the Commission has overstepped the boundaries of interpretation and hence has exceeded its rule-making power. * * *"

The holding of the Court in the *Federal Communications Commission* case is equally controlling in the instant case. The 1958 amendatory regulation likewise exceeded the Secretary's lawful authority.

VI.

The 1958 Regulation Was Denounced by the Then Chairman of the Public Lands Subcommittee of the United States Senate as Constituting a Repeal of the Mineral Leasing Act So Far as Wildlife Areas Are Concerned.

Both prior and subsequent to the adoption of the 1958 regulation the then Chairman of the Public Lands Committee of the United States Senate, the late Senator Joseph C. O'Mahoney, vigorously denounced the Secretary's action as constituting a repeal of the Mineral Leasing Act so far as wildlife areas are concerned.[13] This Committee Print, which discusses in great detail the very regulation and action of the Secretary in the instant case, is a most interesting and illuminating document and we respectfully urge this Court to give it the consideration it deserves. During his tenure in the United States Senate Chairman O'Mahoney was unquestionably the most knowledgeable member of the Senate on the history and purpose of the Mineral Leasing Act and his views are therefore entitled to particular weight. In a letter dated January 24, 1958, to the then Chairman of the full Senate Committee on Interior and Insular Affairs, Senator James E. Murray, which was written about two weeks after the Sec-

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[13] See Committee Print, 85th Congress, 2nd Session, entitled "Executive Modification of the Mineral Leasing Act on Federal Wildlife Lands" (App. B).

retary issued the regulation here in question, Senator O'Mahoney said in pertinent part:[14]

> "At the initial meeting of the Committee on Interior and Insular Affairs this year, I called the attention of the committee to the action of the Secretary of the Interior im promulgating on January 8 amended regulations purporting to govern mineral leasing on large areas of the public lands which the Secretary had designated as Federal Wildlife lands. The purpose of this letter is to advise you and the members of the committee why I intend, as chairman of the Public Lands Subcommittee, to hold hearings on the meaning and effect of the regulations as well as their desirability from the point of view of maximum use of our public lands and resources.
>
> * * *
>
> "The Mineral Leasing Act, Public Law 146, 66th Congress, approved February 25, 1920, originated in the Senate as S. 2775. The then Public Lands Committee of this body and the Public Lands Committee of the House held hearings and conducted all of the other legislative proceedings leading to the favorable reports of both the House and Senate committees on the measure. The act, as its title shows, was designed 'to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain.' Section 1 of the act makes it clear that its provisions apply to all deposits of such minerals and 'lands containing such deposits owned by the United States, including those in national forests * * *'. *The only lands owned by the Federal Government which are excluded by the terms of the statute are those under the Appalachian Forest Act, those in national parks, and those reserved for military or naval purposes.*
>
> "Section 32 of the Mineral Leasing Act gives the Secretary of the Interior the authority 'to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this act.' *I find no provisions authorizing the Secretary to issue any regu-*

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[14] Committee Print, pp. 1-2.

lations out of harmony with the expressed purpose of the act, namely, to promote the development of oil and gas and other minerals on the public domain.

"An examination of the Federal statutes shows that wildlife reservations from the public lands of the character with which we are here concerned are created by acts of Congress and by formal executive withdrawal. *The law pertaining to wildlife refuges fails to reveal authority for the Secretary to prescribe regulations which repeal, in effect, the Oil and Gas Leasing Act so far as wildlife areas are concerned — areas which are not excluded from the operation of the Mineral Leasing Act under the terms of that statute itself. Nor is there any authority of law vesting in the Secretary the power to amend the Mineral Leasing Act in any particular.* * * *" (Emphasis added.)

A few days later, on January 28, 1958, Chairman Murray wrote Secretary of the Interior Fred A. Seaton asking him specifically and directly what his authority was for shutting off wildlife areas of the public domain from mineral leasing.[15] Secretary Seaton responded to this letter on February 22, 1958.[16] On May 22, 1958, Chairman O'Mahoney wrote to Secretary Seaton[17] again denouncing the 1958 regulation as a repeal of the Mineral Leasing Act in its impact on wildlife areas and enclosed a memorandum of law dated May 13, 1958, from the Committee Counsel to the Subcommittee Chairman on the subject at hand.[18] Secretary Seaton responded on August 7, 1958, with a legal memorandum of his Solicitor.[19] Committee

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[15] Reference to this letter appears in the Committee Print, at p. 6 (App. B).

[16] Id.

[17] Committee Print, pp. 3–4 (App. B).

[18] Id., pp. 5–9 (App. B).

[19] Id., pp. 10–16 (App. B).

Counsel then submitted a memorandum dated January 26, 1959, to Senator O'Mahoney responsive to the Solicitor's opinion.[20] On the same day Chairman O'Mahoney wrote to the members of the Senate Committee on Interior and Insular Affairs once again expressing his great concern over this matter from the standpoint of the legislative responsibility of the Congress under the Constitution over the public lands and the encroachment on its responsibility by the Executive branch.[21] His letter proposed that an inquiry be made by the Public Lands Committee with members of the full committee or other senators urged to participate.[22]

We submit that the Committee Print (App. B) conclusively demonstrates that it was not Subcommittee Chairman O'Mahoney alone as an individual Senator but also the Chairman of the full committee and Committee Counsel who all played a leading role in criticizing the encroachment by the Interior Department on the legislative responsibility of Congress for the development of the public lands as reflected by the Mineral Leasing Act. The fact that Senator O'Mahoney's "spark did not catch fire with the other members of his Committee, and the hearings he requested were never held," as the Court of Appeals pointed out at pp. 751-752, does not alter the conviction of able and knowledgeable key figures on the Senate Interior and Insular Affairs Committee that the Secretary's 1958 regulation constituted an attempt to repeal the Mineral Leasing Act so far as wildlife areas are concerned.

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[20] Id., pp. 16-19 (App. B).

[21] Id., Foreword, p. III (App. B).

[22] No inquiry or hearing was ever conducted because Senator O'Mahoney suffered a cerebral hemorrhage in June 1959 and at the end of his term retired from public life.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MAX BARASH

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711 - 14th Street, N. W.
Washington, D. C. 20005

Attorney for Petitioner

December 21, 1965

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17358

BERT F. DUESING, APPELLANT,

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLEE.

No. 17403

GEORGE HALL DOUGLASS, APPELLANT,

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLEE.

Appeals from the United States District Court
for the District of Columbia

Decided June 30, 1965

Mr. Max Barash, for appellant in No. 17358.

Mr. H. St. John Butler, for appellant in Nos. 17403.

Mr. Edmund B. Clark, Attorney, Department of Justice, with whom *Assistant Attorney General Clark, Messrs. Roger P. Marquis* and *Herbert Pittle,* Attorneys, Department of Justice, were on the brief, for appellee.

Before DANAHER, *Circuit Judge,* BASTIAN, *Senior Circuit Judge,* and LEVENTHAL, *Circuit Judge.*

LEVENTHAL, *Circuit Judge*: These are appeals from orders granting summary judgment to appellee, Secretary of the Interior, and dismissing the complaints of appellants. The lawsuits sought to establish the invalidity of the decision of the Secretary of the Interior closing the southern half of the Kenai National Moose Range in Alaska for oil and gas leasing, in consequence of which appellants' noncompetitive applications were rejected. We affirm.

The Moose Range was created in 1941 by Executive Order No. 8979, 6 F.R. 6471, by which approximately two million acres of the public domain were set aside "as a refuge and breeding ground for moose." Between December 1955 and January 1958, noncompetitive oil gas lease applications relating to acreage in the southern half of the Moose Range were filed by appellants pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C. sec. 226). Appellants contend that these offers, which were consistent with, and it is claimed "invited" by, the regulations then in effect (Circular 1945, approved December 6, 1955, 20 F.R. 9009), conferred a vested right in appellants which was unlawfully impaired and cancelled by the Secretary's actions in refusing to lease, done pursuant to revision of the regulation (Circular 1990, January 8, 1958, 23 F.R. 227).

The background of the regulations pertaining to leasing of wildlife refuge lands (see 43 C.F.R. 192.9), and a description of their increasingly restrictive quality, are set forth in *Udall* v. *Tallman,* 380 U.S. 1, at 5-14 (1965). The

1955 regulation was more restrictive than an initial 1947 regulation, which had simply required that leases be subject to an approved unit plan and required the Secretary's consent prior to drilling. By an inter-agency memorandum dated August 31, 1953, the Interior Department suspended action on all pending oil and gas lease applications for lands within wildlife refuges, pending completion of a study and possible revision of policy and regulations. The 1955 regulation gave increased power to the Fish and Wildlife Service to avoid impairment of usefulness of the lands for wildlife conservation purposes. Certain areas were declared "not available for leasing," other areas were available under restrictions. As to the areas in question the regulation provided: "Oil and gas leases may be issued for other lands administered by the Fish and Wildlife Service" provided they contain specified conditions requiring approval by the Fish and Wildlife Service of the type of prospecting to be conducted, and adoption by the lessee of a unit plan approved by the Service. In 1956 bills were introduced seeking Congressional restriction of oil and gas leasing in wildlife refuges. Instead, an arrangement was worked out, for an experimental period, whereby proposals for lease would be submitted, for approval or disapproval within 60 days, to the House Committee on Merchant Marine and Fisheries. In July 1956, that Committee concluded that administrative proposals for leases for 71,680 acres in the northern half of the Moose Range "would not be detrimental to the wildlife values of the Moose Range" and concurred therein.

The Secretary's 1958 revision of the regulation "represented a near total victory for the conservationists." It was a general prohibition of oil and gas leasing in wildlife refuges. Alaska was an exception and here it was provided that agreements were to be reached by the Bureau of Land Management and the Fish and Wildlife Service, specifying lands not subject to leasing and provi-

sions required in leases on the remaining lands, to be effective upon approval by the Secretary. The Secretary published notice in the Federal Register on August 2, 1958, 23 F.R. 5883, of an agreement he had approved July 24, 1958, which set forth that certain lands in the Moose Range (essentially the southern half comprising about 1,689 square miles) "are hereby closed to oil and gas leasing because such activities would be incompatible with management thereof for wildlife purposes." About 1,525 square miles covering the northern half of the range was left open to leasing.

I

Appellants fail in their contention that they obtained a vested right with their applications since it lay entirely within the discretion of the Secretary whether or not to issue leases on the lands involved.

Section 17 of the Mineral Leasing Act of 1920, 41 Stat. 437, 30 U.S.C. sec. 181, as amended to and including the Act of August 8, 1946, 60 Stat. 950, read insofar as pertinent:

> "Sec. 17. All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits may be leased by the Secretary of the Interior. When the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible qualified bidder by competitive bidding under general regulations, * * *. When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding."

Under section 17 it is permissive or discretionary whether or not the Secretary will issue a lease on lands believed to contain oil or gas deposits. What is mandatory is who is to get the lease if it is decided that a lease will be is-

sued—if there is a known geologic structure, the highest bidder; if not, the applicant first in line.

As we said in *Haley* v. *Seaton*, 108 U.S. App. D.C. 257, 262, 281 F.2d 620, 625 (1960), the legislative intent was "to give the Secretary of the Interior discretionary power, rather than a positive mandate to lease." More recently the Supreme Court said in *Tallman* (380 U.S. at 4):

> "Although the Act directed that if a lease is issued on such a tract [not within a known geologic structure of a producing oil and gas field], it must be issued to the first qualified applicant, it left the Secretary discretion to refuse to issue any lease at all on a given tract."

The filing of an application which has not been accepted does not give any right to a lease, or generate a legal interest which reduces or restricts the discretion vested in the Secretary whether or not to issue leases for the lands involved.

II

Without specifying which appellants make which arguments, we address ourselves to a collection of contentions assailing the Secretary's exercise of his discretion. It is contended that the Secretary's authority permits refusal to lease "on a given tract" (see *Tallman*), but not on a large area of 1,689 square miles. A subsidiary contention is that the Secretary's 1958 action amounted to an indirect "withdrawal" that did not comply with the Pickett Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. sec. 141 *et seq.*, which requires that withdrawals be reported to Congress, and further did not comply with the regulations providing for notice and public hearings prior to making withdrawals. Circular 1982, August 12, 1957, 22 F.R. 6613, 43 C.F.R. 295.

Assistant Secretary Carver's thoughtful decision in the case of *Richard K. Todd et al.*, 68 I.D. 291, pointed out that the Secretary of Interior had not exercised his with-

drawal power. Thus the Secretary had not designated his action as "public land orders" which is required as to withdrawal by Executive Order No. 10355 of May 26, 1952 (17 F.R. 4831), whereby the President expressly delegated to the Secretary the authority to withdraw public lands. Mr. Carver further stated (68 I.D. at 296):

> "Stripped of all authority to withdraw lands, the Secretary would still have his discretionary authority to refuse to issue leases where he thinks issuance would not be in the public interest.
>
> "The formal exercise by the Secretary of his discretionary authority is nothing new in the administration of the Mineral Leasing Act."

Reference is made to actions whereby the Department formalized the cessation of leasing in New Mexico in 1939 (4 F.R. 1012), in Iranpah Valley, California in 1942, and in the wilderness areas of the Los Padres National Forest, California, and the Sante Fe National Forest, New Mexico, in 1953 (Departmental Order 2714, 18 F.R. 700).

We show great deference to the construction and application of a statute by the officers charged with its administration, *Udall* v. *Tallman, supra,* at 16, and cases cited. The construction recorded in the *Todd* decision presents a reasonable viewpoint, supported by the administrative practice cited therein. We find that the Secretary has not exceeded his authority under section 17.

Appellant Duesing starts off from the general proposition that an agency's authority to issue implementing regulations contemplates regulations in furtherance of the act and winds up with the conclusion that the Secretary can only exercise his discretion under the Mineral Leasing Act by taking action in furtherance of the objective of that act to promote mineral development in the public domain. We reject the argument that in answering the question, to lease or not to lease, the Secretary must ignore the primary objectives of holding and using the land and consider solely the purpose of the lease. This tail

wags dog construction is not put forward as supported by legislative history and we see no warrant for overturning what is at least a reasonable administrative construction. Indeed the argument would not even merit discussion were it not stressed by counsel knowledgeable in the field and supported by vigorous statements of the late Senator O'Mahoney, former Chairman of the Subcommittee on Public Lands.[1] Of course Senator O'Mahoney's 1958 and 1959 comments are no part of the legislative history of the Mineral Leasing Act, passed in 1920 and amended through 1946. His spark did not catch fire with the other members of his Committee, and the hearings he requested were never held. The 1956 House Committee actions described above reflect a contrary approach.

It is not insignificant that when the Mineral Leasing Act was amended in 1960, section 17 was left substantially intact, notwithstanding obvious Congressional awareness of the Secretary's construction of the law, and his deliberate adherence to that construction notwithstanding Senator O'Mahoney's sharp protest against alleged executive usurpation of authority. The implication of legislative approval[2] is heightened by the fact that the 1960 amendment was enacted after extensive hearings held on the bill and predecessor measures sponsored by Senator O'Mahoney, and that the bill was described as having two purposes: First, to make such changes of substance in the

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[1] Senator O'Mahoney's letter of January 24, 1958, to the Chairman of the Senate Committee on Interior and Insular Affairs, and his letter of January 26, 1959, to the members of the Committee, appear in "Executive Modification of the Mineral Leasing Act on Federal Wildlife Lands" 1, iii, 85th Cong., 2d Sess. (Comm. Print 1959).

[2] *National Lead Co.* v. *United States*, 252 U.S. 140, 146 (1920); *Boesche* v. *Udall*, 373 U.S. 472, 482-83 (1963); *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 154 F.2d 785, 790-91 (2d Cir. 1946).

Mineral Leasing Act shown by experience to be desirable; second, to restate sections 17 and 27 (described as amended so much over the years "that they have become something of a hodgepodge"), restating them "in their entirety to clarify the language."[3] The initial sentence of section 17, which was dominant in the thinking of the Secretary and the courts, was left intact.

Finally, some appellants allege that the Secretary's closing of the southern half of the Moose Range from leasing was arbitrary and capricious, because "oil and gas exploration and development is compatible with the management of the Range for wildlife purposes." Or in the words of the *Todd* decision, appellants purport "to demonstrate that 'oil is compatible with moose' or that the division made is illogical."

Appellants do not contradict Assistant Secretary Carver's statement in the *Todd* decision that at the hearing held December 9 and 10, 1957,[4] on the proposed revision of 43 C.F.R. 192.9, there was testimony both in support of and in opposition to advocates of leasing. The agreement by the Bureau of Land Management and the Fish and Wildlife Service represented their considered judgment that the division made is the proper method of balancing the several components of the public interest in this area. In a case like this the court does not seek to

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[3] S. Rep. No. 1549, 86th Cong. 2d Sess. 1 (1960).

[4] The hearing was held pursuant to notice in the Federal Register of October 11, 1957 (22 F.R. 8088), which clearly stated that all or part of the Alaska wildlife areas might be closed to mineral leasing.

In view of this notice and hearing we see no merit in the contention that there was a procedural defect in the adoption of the regulation. Sec. 4 of the Administrative Procedure Act, 5 U.S.C. sec. 1003, is inapplicable, since this was a regulation relating to "public property." *McNeil* v. *Seaton*, 108 U.S. App. D.C. 296, 301, 281 F.2d 931, 936 (1960).

make a de novo determination. It suffices if there was reasonable basis for the executive department to reach its conclusion. Appellants have not made a tender sufficient to overcome the presumption of validity of administrative action. The court does not presume to substitute its discretion for that of the Secretary.

Affirmed.

[Caption Omitted]

JUDGMENT

These appeals came on to be heard on the records on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the orders of the District Court on appeal in these cases are affirmed.

Per Circuit Judge Leventhal.

DATED: June 30, 1965

As amended by order of this court filed June 30, 1965.

[Caption Omitted]

ORDER

On consideration of appellant's petition for rehearing en banc, it is

ORDERED by the court en banc that appellant's aforesaid petition is denied.

Per Curiam

Dated: SEP 23 1965

85th Congress
2d Session

COMMITTEE PRINT

EXECUTIVE MODIFICATION OF THE MINERAL LEASING ACT ON FEDERAL WILDLIFE LANDS

Presented by Senator Joseph C. O'Mahoney,
Chairman, Subcommittee on Public Lands

OF THE

COMMITTEE ON
INTERIOR AND INSULAR AFFAIRS
UNITED STATES SENATE

Printed for the use of the Committee on Interior and Insular Affairs

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COMMITTEE PRINT

85th Congress
2d Session

[Caption Omitted]

JUDGMENT

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ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the orders of the District Court on appeal in these cases are affirmed.

Presented by Senator Joseph C. O'Mahoney, Chairman of the Committee on Interior and Insular Affairs.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,965.

September Term, 1965.

On consideration of appellant's petition for rehearing en banc, it is

ORDERED by the court that appellant's aforesaid petition is denied.

Per Curiam

Dated: SEP 23 1965

Printed for the use of the Committee on Interior and Insular Affairs

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1965

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FOREWORD

U.S. SENATE,
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
January 26, 1959.

To the Members of the Committee on Interior and Insular Affairs:

As the members of the committee undoubtedly are aware, I have been increasingly troubled by the growing tendency on the part of the executive branch to suspend or modify acts of Congress by administrative action without statutory or constitutional authority. Such encroachment on legislative responsibilities has been especially flagrant with respect to the public lands.

Clause 2, section 3, article IV of the Constitution provides:

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States.

In fulfillment of this responsibility, the Congress has enacted a long series of laws providing for disposition or use of the lands and resources belonging to the United States. Included in these congressional enactments are statutes setting aside specific areas for fish and wildlife purposes, and, in 1920, a general leasing statute for oil and gas and certain other minerals (act of February 25, 1920). Nowhere in this act is there authority for the Secretary of the Interior to modify or suspend it, at will, with respect to any of the lands to which it applies. Nowhere in this or any other act is authority given to the Secretary to withdraw or set aside any areas he may see fit to designate Federal wildlife lands.

Yet many millions of acres of the public lands of the United States have been so set aside by the Secretary, and the Mineral Leasing Act, in fact, suspended or amended with respect to them as the result of regulations which the Secretary purported to issue on January 8, 1958 (43 CFR 192.9). These regulations cite as their authority section 32 of the act itself. But Congress in the act gave the Secretary power to issue regulations only for the purpose of carrying it into effect, not authority to amend it. This is the clear meaning of the language of Congress in section 32 of the Mineral Leasing Act.

I believe the members of the committee will agree that an inquiry into the question of the best use of our remaining public lands, and the full development of all of their resources in accordance with the principle of multiple use, should be undertaken. I propose that such an inquiry be made by the Public Lands Subcommittee, with all other members of the committee, or any other Senators, urged to participate fully and freely.

In order that we may start with some of the basic facts before us, and have reference to pertinent laws readily available, I am submitting to the members the following:

(1) The text of my letter to the chairman of the committee, setting forth certain events and their chronology surrounding the issuance of the regulations of January 8, 1958.

(2) My letter to Secretary Seaton transmitting a copy of a memorandum of law prepared at my direction by the committee counsel, Stewart French, on the Secretary's authority, or lack of it, with respect to issuance of said regulations.

(3) The memorandum opinion of the then Solicitor of the Interior Department, Elmer Bennett, asserting, in effect, the Secretary's "blank check" authority.

(4) The committee counsel's comments on the Solicitor's opinion.

The Department of the Interior has published Mr. Bennett's opinion (63 I. D. 305), thus giving his conclusions official weight, and I deem it highly desirable that the statement of facts on which my protest to the Secretary was based likewise be preserved and available for ready reference in our inquiry.

JOSEPH C. O'MAHONEY,
Chairman, Public Lands Subcommittee.

MINERAL LEASING ON FEDERAL WILDLIFE LANDS

LETTER TO COMMITTEE CHAIRMAN AND MEMBERS

UNITED STATES SENATE,
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
January 24, 1958.

Hon. JAMES E. MURRAY,
Chairman, Committee on Interior and Insular Affairs,
United States Senate, Washington, D. C.

DEAR MR. CHAIRMAN: At the initial meeting of the Committee on Interior and Insular Affairs this year, I called the attention of the committee to the action of the Secretary of the Interior in promulgating on January 8 amended regulations purporting to govern mineral leasing on large areas of the public lands which the Secretary had designated as Federal wildlife lands. The purpose of this letter is to advise you and the members of the committee why I intend, as chairman of the Public Lands Subcommittee, to hold hearings on the meaning and effect of the regulations as well as their desirability from the point of view of maximum use of our public lands and resources.

These regulations were approved by Secretary Seaton after I had appeared at the public hearing of the Department of the Interior on them, called in compliance with the requirements of the Administrative Procedure Act, and had there expressed, publicly and officially, the opinion that the Congress should have opportunity to look into the matter before the regulations were promulgated. The Interior Department's hearings were held on December 9 and 10, 1957, before Assistant Secretaries Leffler and Ernst. At that time, Congress was in recess. Although my commitments were such as to call me to Wyoming, I nevertheless postponed my departure in order to appear at the hearings personally and made my announcement publicly.

The Legislative Reorganization Act, which has been adopted as rule 25 of the Senate, apportions to this committee general legislative jurisdiction over the following subjects, among others:

1. Public lands generally, including entry, easements, and grazing thereon.
2. Mineral resources of the public lands.

* * * * * * * * *

10. Mining interests generally.
11. Mineral land laws and claims and entries thereon.

* * * * * * * * *

14. Petroleum conservation and conservation of the radium supply in the United States.

The Mineral Leasing Act, Public Law 146, 66th Congress, approved February 25, 1920, originated in the Senate as S. 2775. The then Public Lands Committee of this body and the Public Lands Committee of the House held hearings and conducted all of the other legislative proceedings leading to the favorable reports of both the House and Senate committees on the measure. The act, as its title shows, was

designed "to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain." Section 1 of the act makes it clear that its provisions apply to all deposits of such minerals and "lands containing such deposits owned by the United States, including those in national forests * * *." The only lands owned by the Federal Government which are excluded by the terms of the statute are those under the Appalachian Forest Act, those in national parks, and those reserved for military or naval purposes.

Section 32 of the Mineral Leasing Act gives the Secretary of the Interior the authority "to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this act." I find no provisions authorizing the Secretary to issue any regulations out of harmony with the expressed purpose of the act, namely, to promote the development of oil and gas and other minerals on the public domain.

An examination of the Federal statutes shows that wildlife reservations from the public lands of the character with which we are here concerned are created by acts of Congress and by formal executive withdrawal. The law pertaining to wildlife refuges fails to reveal authority for the Secretary to prescribe regulations which repeal, in effect, the Oil and Gas Leasing Act so far as wildlife areas are concerned—areas which are not excluded from the operation of the Mineral Leasing Act under the terms of that statute itself. Nor is there any authority of law vesting in the Secretary the power to amend the Mineral Leasing Act in any particular. This the regulations purport to do, although in explicit and unambiguous language the act provides that competitive bidding shall be required only when the lands "to be leased are within any known geological structure of a producing oil and gas field." Indeed, this section of the act goes further and specifically declares that when the lands to be leased are not within any known geological structure of a producing oil or gas field, the first qualified applicant shall be entitled to a lease without competitive bid.

At the departmental hearing, representatives of the oil and gas industry asserted unequivocally that it was entirely possible to produce oil and gas within a wildlife refuge without injury either to the refuge itself or the wildlife. From the record it is clear that the industry is quite willing to accept reasonable regulations for the protection of refuges and wildlife. As chairman of the Public Lands Subcommittee, I reiterated at this hearing my own belief that wildlife should be conserved and protected, and that regulations should be issued to accomplish this result. I suggested no changes in the proposed regulations presented at the hearing save those which, while protecting all of the interests of wildlife, would at the same time allow access under existing law to the oil and gas deposits in wildlife areas. My reason is that this is a period of world turbulence, which, if it unfortunately results in a third world war, would almost inevitably make our Nation dependent upon our own sources of oil for our security.

Therefore, it is my intention to set a day certain for public hearings by the Public Lands Subcommittee, or by the full committee if it so desires, at which all interested parties may be heard. I should point out that after my appearance at the hearing in the Department of the Interior on December 9, I called personally on Secretary Seaton to advise him of my point of view and of my intention to hold hearings

on the proposed regulations after Congress reassembled. I had no intimation from the Secretary that it would be his purpose to act before the Congress had opportunity to look into the matter. Congress reassembled on January 7, and the Secretary approved the new regulations on January 8, 1 day after we reconvened and before we possibly could have considered the question. It seems only reasonable that since the Members of Congress were not available at the time of the December 9 hearing, the Secretary should have withheld final action for at least a reasonable time after the start of the second session.

I trust you and other members of the committee concur in my conviction that the jurisdiction and responsibility of Congress over the public lands of the United States should be recognized by the Department of the Interior.

Sincerely yours,

JOSEPH C. O'MAHONEY,
Chairman, Public Lands Subcommittee.

LETTER TO SECRETARY OF THE INTERIOR TRANSMITTING MEMORANDUM OF LAW

UNITED STATES SENATE,
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
May 22, 1958.

Hon. FRED A. SEATON,
Secretary of the Interior,
Department of the Interior,
Washington, D. C.

DEAR MR. SECRETARY: Recently you and I had another of our conversations on the troublesome question of the suspension or modification of acts of Congress by administrative directive. Specifically, our subject was the withdrawal by the Interior Department on its own initiative of large areas of the public domain as Federal wildlife lands and either closing such lands off from the Mineral Leasing Act provisions entirely or materially modifying the statute with respect to them.

You will recall that you agreed that if I could convince you that the Secretary of the Interior lacks authority to withdraw limitless areas of the public domain and suspend or modify acts of Congress with respect to them, you would be willing to leave responsibility for management and control over the public domain where the Constitution of the United States places it, * * * in the Congress of the United States.

The issue, as I remarked to you, is distinctly not whether wildlife should be protected. I am for such protection and, as I am sure my long record of public service shows, I have been a champion of wildlife and of conservation over many years and in many different ways. I am proud of my record in helping preserve and develop all of our great natural resources.

The basic issue is something quite different. Clause 2, section 3, article 4 of the Constitution provides specifically that—

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

I have not been able to find any act of Congress delegating to any branch of the executive department the power to dispose of the territory or other property of the United States or the power to make rules and regulations with respect thereto. Certainly there is no constitutional amendment for this purpose, and when the recent regulations affecting wildlife reserves were issued, the authority cited therein was not the Pickett Act of 1910 but the provisions of the Mineral Leasing Act of 1920. In this act, Congress gave the Secretary of the Interior authority to make regulations to carry out the purposes of that act, but nowhere in that law is there found any attempt to delegate to the Secretary of the Interior the authority to amend the act with respect to the areas to which it applies.

The Mineral Leasing Act was clearly described in the statute as a law to promote the development of certain mineral resources of the public domain. Some areas of the public domain were excepted from the operation of the law, but after reciting these excepted areas in which wildlife lands were not included, the statute itself states that it shall be applicable to all other areas. This law was passed 10 years after the Pickett Act was enacted and, as stated above, the only authority cited in the regulations is the Mineral Leasing Act.

I desire to cooperate with you in every respect for the protection of wildlife. My concern is not directed at the regulations themselves per se, but arises solely from the constitutional question. I am fearful that these wildlife regulations will be used as a precedent for future Secretaries of the Interior to disregard the enactments of Congress. We are engaged in a worldwide political and economic conflict involving the protection of free government from the authoritarian activities of dictators. Free government has its basis upon the right of the people to make their laws through elected representatives rather than by appointed officials of the executive branch of government.

You were good enough to tell me that your Solicitor had advised you that the Secretary does have the authority exercised in the regulations of January 8. I took the liberty of consulting him and asking him to confer with Mr. Stewart French, counsel for the Interior Committee. Mr. French has prepared a memorandum of law on the subject, a copy of which I am enclosing, and I would very much appreciate it if you will be good enough, after reading it yourself, to refer it to the Solicitor so that the proposed conference may be held.

Sincerely yours,

JOSEPH C. O'MAHONEY,
Chairman, Public Lands Subcommittee.

MEMORANDUM OF LAW FROM COMMITTEE COUNSEL TO SUBCOMMITTEE CHAIRMAN

UNITED STATES SENATE,
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
May 13, 1958.

MEMORANDUM

To: Senator Joseph C. O'Mahoney.
From: Stewart French, Committee Counsel.
Subject: Authority to Withdraw Public Domain Lands for Wildlife Purposes.

In accordance with your instruction, there is submitted a brief discussion of the legal authority of the Secretary of the Interior to withdraw, at his own discretion, limitless areas of the public domain as "Federal wildlife lands" and by his own administrative regulation exclude them from the operation of the Mineral Leasing Act (41 Stat. 437), or to modify the provisions of said act with respect to them.

1. The Mineral Leasing Act itself does not make such a grant of authority

On January 8, 1958, the Secretary of the Interior promulgated regulations amending section 192.9 of title 43 of the Code of Federal Regulations (23 Fed. Reg. 227, Jan. 11, 1958). These regulations, in effect, suspended the operation of the Mineral Leasing Act with respect to certain types of wildlife withdrawals attempted to be created by the Secretary of the Interior out of the public lands or acquired lands. As to certain other types of such executive withdrawals, the regulations substantially modified the act, imposing new burdens and new restrictions on leasing not contemplated by the terms of the act.

The Secretary cited as authority for his action section 32 of the Mineral Leasing Act (41 Stat. 450; found in 30 U. S. C. 189). This section is as follows, in full:

> That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this Act: *Provided*, That nothing in this Act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States.

For the "purposes of this act" we look to the act itself. The act is entitled:

> An Act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain.

Section 1 provides, in pertinent part:

> Deposits of coal, phosphate, sodium, potassium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Act known as the Appalachian Forest Act, approved March 1, 1911 (36 Stat. 961), and those in incorporated cities, towns, and villages and in national parks and monuments, those acquired under other Acts subsequent to February 25, 1920, and lands within the naval petroleum and oil-shale reserves, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to associations of such citizens, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, or in the case of coal, oil, oil shale, or gas to municipalities.

Thus, the only regulations authorized by section 32, cited by the Secretary, are regulations which would promote the mining of oil and gas and provide for their disposition to citizens of the United States or associations of such persons.

It will be noted that the section spells out with exactitude the several categories of land that are expressly excluded from the operation of the act. Lands designated as "Federal wildlife lands" and withdrawn by administrative directive for wildlife purposes are not included in the categories enumerated. Clearly, this is an instance in which the classic axiom applies:

Expressio unius est exclusio alterius.

It is submitted that the regulations themselves, suspending or modifying as they do the provisions of the Mineral Leasing Act from nonexempted areas of the public lands, are inconsistent with and in conflict with the purposes of the statute. They go far beyond that which is "necessary and proper * * * to carry out and accomplish the purposes of the Act" which is to promote the production of oil and gas. The Supreme Court has ruled on a number of occasions that a regulation out of harmony with a statute is a nullity. See inter alia *Miller* v. *United States*, 294 U. S. 435: *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 349; *Manhattan General Equipment* v. *Commissioner*, 297 U. S. 192, 134–135.

In the *Manhattan* case, supra, the Supreme Court said (at pp. 134–135):

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. *A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.* *Lynch* v. *Tilden Produce Co.*, 256 U. S. 315, 320–322; *Miller* v. *United States*, 294 U. S. 435, 439–440, and cases cited. And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable. *International Ry. Co.* v. *Davidson*, 257 U. S. 506, 514. The original regulation as applied to a situation like that under review is both inconsistent with the statute and unreasonable. [Emphasis added.]

In *Miller* v. *United States*, supra, the Supreme Court said (at pp. 439–440):

> It [the administrative regulation] is invalid because not within the authority conferred by the statute upon the Director (or his successor, the Administrator) to make regulations to carry out the purpose of the Act. It is not, in the sense of the statute, a regulation at all, but legislation. * * * This is beyond administrative power. *The only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the purposes of the act—not to amend it.* *United States* v. *200 Barrels of Whiskey*, 95 U. S. 571, 576; *Morrell* v. *Jones*, 106 U. S. 466, 467; *United States* v. *Grimaud*, 220 U. S. 506, 517; *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599, 610. [Emphasis added.]

2. No other act of Congress has been found delegating to the Secretary general authority to make wildlife withdrawals suspending or modifying the Mineral Leasing Statute

On January 28, 1958, Chairman Murray wrote Secretary Seaton asking him specifically and directly what was his authority to shut off areas of the public domain from mineral leasing for wildlife purposes. Under date of February 22, Secretary Seaton replied, reiterating his belief that section 32 of the Mineral Leasing Act did in fact give him such authority, but citing in addition the Acquired Lands Act of 1947.

This act, in general, made the provisions of the Mineral Leasing Act of 1920 applicable to acquired lands of the United States. Its express purpose, set forth in its title, was—

To promote the mining of coal, phosphate, sodium, potassium, oil, oil shale, gas and sulphur on lands acquired by the United States.

Section 3 spells out certain categories of lands to which the act does not apply, but wildlife lands are not among the exempted categories. All of the discussion pertaining to the Mineral Leasing Act, above, is equally pertinent to the contention that the Acquired Lands Act gives general authority to any administrative officer to suspend or modify the provisions of the Leasing Act at his discretion. No such blanket authority exists in law.

The Secretary's response to the chairman also lists, albeit somewhat incidentally, the act of June 25, 1910 (36 Stat. 847—erroneously cited in the letter). This is the so-called Pickett Act, or General Withdrawal Act. By it, the 61st Congress provided:

the President may, at any time, in his discretion, *temporarily* withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for waterpower sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an act of Congress. [Emphasis supplied.]

Enactment of this statute grew out of the proclamation of President Taft of September 27, 1909, creating Teapot Dome, as a "temporary withdrawal in aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain."

In the Midwest case (*U. S.* v. *Midwest Company*, 230 U. S. 459; 1915) the Supreme Court upheld the validity of the Teapot Dome withdrawal on the theory that Congress had acquiesced in and had never repudiated the action of successive Presidents of the United States in making withdrawals. President Taft, however, in this special message to Congress requesting the legislation which resulted in the Pickett Act expressed his doubts as to his authority to make withdrawals such as Teapot Dome.

Moreover, the Supreme Court held in the Midwest case:

We need not consider whether as an original question, the President could have withdrawn from private acquisition what Congress had made free and open to occupation and purchase.

In the House committee report on the Pickett Act (Rept. No. 983, 61st Cong.) stated:

No statute has been found expressly conferring this authority (id est, to withdraw public lands), and the extent thereof has not been settled by the Supreme Court.

The report goes on to discuss proposals for "protecting and conserving public interest in valuable oil, coal, and other mineral land, waterpower sites, etc." Nowhere in the report, or in reports on the 1912 amendment to the act, are fish and wildlife withdrawals even mentioned.

If there were any doubt that the Pickett Act was not intended to confer limitless "blank check" authority on the Executive to withdraw public domain lands without the approval of Congress, that doubt would be removed by the clear provisions of the act itself. Section 1 gives the President authority to withdraw lands "temporarily" and

then provides: "Such withdrawals or reservation shall remain in force until revoked by him or by Act of Congress."

The act of February 25, 1920, was an act of Congress, and it spells out in specific detail the only types of public lands to which the act does not apply. Executive withdrawals of fish and wildlife lands are not so listed.

Furthermore, at the time of enactment of the Mineral Leasing Act there were in existence a substantial number of fish and wildlife withdrawals created by acts of Congress. With these statutory withdrawals before it, the Congress did not see fit to exclude them from the operation of the Mineral Leasing Act.

As pointed out, the Secretary asserted as his authority for the January 8 regulation section 32 of that act. He does not cite the Pickett Act because, it is submitted, the Pickett Act carefully retains in the Congress the power granted by clause 2, section 3, article 4 of the Constitution—

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States.

The Secretary's letter also mentions *U. S.* v. *Wilbur* (283 U. S. 414). In this case a qualified applicant brought action for a writ of mandamus against the then Secretary of the Interior, Wilbur, to compel him to reinstate his application for a prospecting permit and act upon it according to its merits. After the application, the Secretary had instructed all local land offices to reject all pending applications for prospecting permits and not to receive others.

The District of Columbia Circuit Court of Appeals found the Secretary's action constituted a "temporary" withdrawal under the Pickett Act, and that there was implied authority for such withdrawal on the basis of past Presidential action, coupled with acquiescence by Congress, as was recognized in the Midwest case, supra (46 Fed. 2d 217 (1930)).

The Supreme Court, by Mr. Justice McReynolds, affirmed the denial by the appeals court of the mandamus, stating:

> Certainly there is a plausible, if not conclusive argument that so far as it [the Mineral Leasing Act] relates to the leasing of oil lands it goes no further than to empower the Secretary to execute leases which exercising a reasonable discretion, he may think would promote the public welfare (at page 419).

The Court goes on to hold:

> Under the established rule the writ of mandamus cannot be made to serve the purpose of an ordinary suit. It will issue only where the duty to be performed is ministerial and the obligation to act peremptory, and plainly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable.

It is submitted that Secretary Wilbur's action patently was a "temporary" one, taken in furtherance of the purposes of the Mineral Leasing Act. The Supreme Court was careful not to follow the court of appeals in its justification of the suspension of issuance of all prospecting permits by the Pickett Act. Justice McReynold's opinion cites and quotes the Leasing Act itself in upholding the temporary action of Secretary Wilbur.

Clearly the facts and the applicable law of the Wilbur case, involving a temporary suspension of prospecting permits, are not applicable to facts and law respecting creation of permanent Federal wildlife lands by Executive order.

CONCLUSION

Neither the Mineral Leasing Act, cited in the regulations as their authority, nor the Acquired Lands, nor the Pickett Act, nor any other act of Congress delegates to the executive branch general authority to withdraw, by administrative action alone, for wildlife purposes limitless areas of the public domain and suspend or modify acts of Congress with respect to them.

STEWART FRENCH.

SOLICITOR'S MEMORANDUM OPINION AND PRESS RELEASE

DEPARTMENT OF THE INTERIOR—INFORMATION SERVICE

OFFICE OF THE SECRETARY

For release August 8, 1958

SECRETARY CITES AUTHORITY TO CONTROL OIL LEASING ON WILDLIFE LANDS

Secretary of the Interior Fred A. Seaton today reaffirmed his conviction that he has the authority to regulate oil leasing on Federal wildlife lands and to withdraw lands for wildlife conservation.

The Secretary expressed this view in a letter to Senator Joseph C. O'Mahoney, chairman of the Senate Public Lands Subcommittee.

Secretary Seaton said an opinion of the Solicitor of the Department convinced him that "I not only have the necessary authority to withdraw lands for wildlife conservation purposes, but also that I have an administrative duty to effectuate harmoniously the objectives of both the Mineral Leasing Act and the various wildlife conservation programs."

The Secretary's letter was in response to a request of Senator O'Mahoney that the legal aspects of the question be studied by Solicitor Elmer Bennett in the light of a memorandum of law on the subject prepared by Stewart French, counsel for the Senate Interior Committee.

In memorandum opinion to the Secretary on the validity of the Department's regulations on oil and gas leasing in wildlife refuges, game ranges and coordination lands, the Solicitor declared:

1. The Secretary of the Interior is not authorized by law to effectuate the policies of the Mineral Leasing Acts so single mindedly that he is thereby equally required to ignore the objectives of the wildlife conservation laws.

2. The granting of oil and gas leases on Federal lands is a matter within the discretion of the Secretary of the Interior and regulations reasonably requiring lessees to prevent waste and protect property are valid.

3. Under the permissive language in the Mineral Leasing Act, consent to lease may be granted subject to appropriate conditions prescribed by the Secretary.

4. Administrative withdrawals of public lands for wildlife sanctuaries or refuges in connection with national and international programs are valid.

5. Withdrawals made under the Pickett Act must be within the bounds of a "public purpose," or one of the specified purposes, and the termination of such reservations depends either on an administrative or a congressional revocation.

Secretary Seaton said that the Solicitor's memorandum was prepared following consultations with Mr. French, as suggested by Senator O'Mahoney.

The text of the Secretary's letter and of the Solicitor's memorandum is attached.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D. C., August 7, 1958.

Hon. JOSEPH C. O'MAHONEY,
Chairman, Public Lands Subcommittee,
United States Senate, Washington, D. C.

DEAR SENATOR O'MAHONEY: In accordance with your letter of May 22, 1958, I requested my solicitor to examine further the questions you raise concerning my authority to issue oil and gas leases on Federal wildlife refuges and my authority to withdraw lands for such sanctuaries. Mr. Bennett has submitted a memorandum opinion on these matters, a copy of which I am enclosing for your information. Also, I am advised that Mr. Bennett has conferred with Mr. French as you suggested.

I am further convinced by Mr. Bennett's opinion that I not only have the necessary authority to withdraw lands for wildlife conservation purposes, but also that I have an administrative duty to effectuate harmoniously the objectives of both the Mineral Leasing Act and the various wildlife conservation programs.

I wish to thank you for the copy of the memorandum of law prepared by Mr. French and for your courtesy in having him consult with Mr. Bennett on these matters.

Sincerely yours,

FRED A. SEATON,
Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D. C.

M-36519

MEMORANDUM

To: Secretary of the Interior.
From: The Solicitor.
Subject: Regulations Relating to Oil and Gas Leases on Wildlife Refuges, Game Range and Coordination Lands.

You have requested an informal memorandum opinion concerning your authority to issue the regulations of January 8, 1958,[1] which were designed to protect wildlife sanctuaries in granting oil and gas leases under the Mineral Lands Leasing Acts. It has been suggested that you lack statutory or other authority thus to protect the public

[1] 23 F. R. 237.

interests by issuing these regulations assuring the preservation of wildlife areas for the purposes for which they were set aside or acquired. It has been suggested further that you lack authority to withdraw, by administrative action, areas of the public domain for wildlife conservation purposes. In my opinion, neither suggestion is well founded in the law.

1. The regulations

Section 1 of the Mineral Leasing Act of February 20, 1920,[2] provides, with certain specifications and exceptions, that lands owned by the United States containing designated mineral deposits shall be subject to disposition. Your discretionary authority, as the Secretary of the Interior, in making such disposition stems primarily from section 17 of the act, as amended.[3] It clearly states in permissive language[4] that all lands subject to disposition under the act which are known or believed to contain oil and gas deposits "may be leased by the Secretary of the Interior." Further, you are authorized in section 32[5] to prescribe necessary and proper rules and regulations and to do all things necessary to carry out and accomplish the purposes of the act. We will return to the subject of discretionary authority later.

It has been suggested that by reason of the exclusions in section 1[6] the maxim *expressio unius est exclusio alterius* applies and limits your authority. That maxim is subject to many safeguards and certainly cannot be properly invoked here. According to Sutherland,[7] it requires great caution in its application, and in all cases is applicable only under certain conditions:

> * * * As a tool of statutory interpretation the maxim is important only insofar as it is a syllogistic restatement that the courts will first look strictly to the literal language of the statute to determine legislative intent. And so, where the meaning of the statute is plainly expressed in its language, and if it does not involve an absurdity, contradiction, injustice, invade public policy, or if the statute is penal in nature or in derogation of the common law, a literal interpretation will prevail. Conversely, where an expanded interpretation will accomplish beneficial results, serve the purpose for which the statute was enacted, is a necessary incidental to a power or right, or is the established custom, usage or practice, the maxim will be refuted, and an expanded meaning given. *In all cases the numerous intrinsic and extrinsic aids of interpretation are of importance in ascertaining whether the maxim will prevail.* [Emphasis supplied.]

In this instance, any prescription of rules and regulations necessary to carry out the purposes of the Mineral Leasing Acts on wildlife sanctuaries inevitably involves other statutory programs and national commitments. See for examples:

1. Game Laws of May 25, 1900, 31 Stat. 187, 16 U. S. C. 701. See also 18 U. S. C. 41 et seq.
2. Game Birds Eggs Act of June 3, 1902, 32 Stat. 285, 16 U. S. C. 702.
3. Migratory Birds Act of March 4, 1913, 37 Stat. 847, 16 U. S. C. 673.
4. Kansas Game Preserve Act of June 22, 1916, 39 Stat. 233, and March 10, 1928, 45 Stat. 300.

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[2] 41 Stat. 437, as amended, 30 U. S. C. 181.
[3] 30 U. S. C. 226.
[4] *U. S. ex rel. Boyd* v. *Thomas*, 138 U. S. 252, 260 (1895), and *Texas Hawaii & I. P. Co.* v. *Sullivan*, 284 U. S. 370, 383 (1932).
[5] 30 U. S. C. 189.
[6] 30 U. S. C. 181.
[7] Statutes and statutory construction (3d ed. by Horack, 1943) 2:415-422.

5. Migratory Birds Treaty Act of July 3, 1918, 40 Stat. 755, 16 U. S. C. 703–711.
6. Migratory Birds Protection Proclamation of July 31, 1918, 40 Stat. 1812.
7. Ozark National Forest Game Refuge Act of February 28, 1925, 43 Stat. 1091, 16 U. S. C. 682.
8. Ozark National Game Refuge Proclamation, April 26, 1926, 44 Stat. 2611.
9. The Upper Mississippi Wild Life and Fish Refuge Act of June 7, 1924, 43 Stat. 650, 16 U. S. C. 721 et seq.
10. Fish Conservation Act of May 1, 1928, 45 Stat. 478.
11. Fish and Game Preserve Act (Idaho), December 15, 1928, 45 Stat. 1022.
12. Fish Culture Act, January 29, 1929, 45 Stat. 1142.
13. Migratory Bird Conservation Act of February 18, 1929, 45 Stat. 1222, 16 U. S. C. 715–715r.
14. Migratory Bird Conservation Act of March 16, 1934, 48 Stat. 452, 16 U. S. C. 718–718h.
15. Wildlife Conservation Act of May 19, 1948, 62 Stat. 240, 16 U. S. C. 667b–667d.
16. Fish Restoration and Management Projects Act of August 9, 1950, 64 Stat. 430, 16 U. S. C. 777 et seq.
17. Migratory Birds Conservation Act of July 30, 1956, 70 Stat. 722, 16 U. S. C. 718a et seq.
18. Fish and Wildlife Act of August 8, 1956, 70 Stat. 1119, 16 U. S. C. 742a et seq.

In connection with the above statutory programs it is of interest to note that the Criminal Code specifically states that—

> *Whoever, except in compliance with rules and regulations promulgated by authority of law, hunts, traps, captures, willfully disturbs or kills any bird, fish, or wild animal* of any kind whatever, or takes or destroys the eggs or nest of any such bird or fish, on any lands or waters which are set apart or reserved as sanctuaries, refuges or breeding grounds for such birds, fish, or animals under any law of the United States or willfully injures, molests, or destroys any property of the United States on any such lands or waters, shall be fined not more than $500 or imprisoned not more than six months, or both. [Emphasis supplied.][8]

Even if the Mineral Leasing Acts, taken together were to be considered in the nature of a positive mandate to grant leases rather than as a grant of permissive authority to you as Secretary to take certain action in your discretion,[9] careful consideration to the applicability of those wildlife conservation laws nevertheless would be essential. As a policy matter, you necessarily should adhere to the general proposition that you were not by law authorized to effectuate so single-mindedly the policies of the Mineral Leasing Acts, that thereby you equally were required to ignore the congressional objectives of the above wildlife conservation laws.[10]

> • • • Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.[11]

That principle, in my opinion, should control in this instance.

[8] 18 U. S. C. 41 as enacted into positive law June 25, 1948, 62 Stat. 686. Based largely on Conservation Act of January 24, 1905, 33 Stat. 614.
[9] *U. S. v. Wilbur*, 283 U. S. 414 (1931).
[10] In this connection see *Southern Steamship Co. v. N. L. R. B.*, 316 U. S. 31 (1942).
[11] Ibid., p. 47.

However, returning to the subject of your leasing authority, it is pertinent also to note that the Supreme Court has clearly indicated that the public interest is a factor to be considered in mineral leasing itself.[12]

The Mineral Lands Leasing Acts—

it has said—

> confer broad powers on the Secretary as leasing agent for the Government. We find nothing that expressly prevents him from taking into consideration whether a public interest will be served or injured by opening a particular mine. But we find no grant of authority to create a private contract right that would override his continuing duty to be governed by the public interest in deciding to lease or withhold leases.[13]
>
> * * * [W]e find no authority to freeze this public interest into an irrevocable private property right.[14]

In connection with noncompetitive oil and gas leases issued earlier on lands within wildlife refuges, Assistant Secretary C. Girard Davidson has held:

> * * * With regard to such [wildlife refuge] lands [within the Bitter Lake Unit Area], the purpose of the Fish and Wildlife Service in protecting the wildlife of the refuge would be effectuated by the protection secured by the terms of the unit agreement prohibiting drilling on those lands except with the consent, in writing, of this Department and by the provisions, hereinafter set forth, to be included in this lease * * * The lands of the Unit Area, including the Wildlife Refuge lands within the Unit Area, have been designated as comprising a block of land regarded as logically subject to development under the unitization provisions of the Mineral Leasing Act. The drilling of a test well or wells will be on land outside the refuge. No drilling will be authorized within the refuge area at this time. Should oil or gas be discovered on unitized land outside the refuge and drilling within the refuge prove to be necessary and advisable for the conservation of natural resources, no drilling will be permitted within the refuge even then except *with the consent* in writing of the head of the agency having jurisdiction over the said refuge *and under such terms and conditions as he may deem necessary for the protection of the refuge.* The above provision in the unit agreement and the hereinafter-mentioned provisions of the lease will adequately protect the Wildlife Refuge from the devastation of its prime function, while at the same time making possible the adequate unitization and development of the oil pool. [Emphasis supplied.][15]

Speaking generally of administrative power to condition consent, Mr. Chief Justice Hughes said in *James, State Tax Commissioner* v. *Drano Contracting Co.* (302 U. S. 134, 148 (1937)):

> Normally, where governmental consent is essential the consent may be granted upon terms appropriate to the subject and transgressing no constitutional limitation. Thus, as a State may not be sued without its consent and "permission is altogether voluntary," it follows "that it may prescribe the terms and conditions on which it consents to be sued." *Beers* v. *Arkansas*, 20 How. 527, 529; *Smith* v. *Reeves*, 178 U. S. 436, 441, 442. Treaties of the United States are to be made with the advice and consent of the Senate, but it is familiar practice for the Senate to accompany the exercise of this authority with reservations. Hyde, International Law, Vol. 2, § 519. The Constitution provides that no State without the consent of Congress shall enter into a compact with another State. It can hardly be doubted that in giving consent Congress may impose conditions. See *Arizona* v. *California*, 292 U. S. 341, 345.

This Department has taken a similar position consistently in asserting the power to condition its administrative consent. As stated earlier by the Assistant Secretary:

> The power of the Secretary of the Interior to establish this legal relationship [between the United States and the lessee] flows from the fact that assignments

[12] *Chapman* v. *Sheridan-Wyoming Coal Co., Inc.*, 338 U. S. 621 (1949).
[13] Pp. 627-628.
[14] P. 630.
[15] 59 I. D. 309, 311 (1946).

may be made only with his consent, and "where governmental consent is essential, the consent may be granted upon terms appropriate to the subject and transgressing no constitutional limitation." *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 148. That is to say, the power to grant or withhold consent includes the power to impose reasonable conditions in giving consent. 36 Op. Atty. Gen. 29, 38, I. D. 174, 183; cf. *Montana Eastern Pipeline Company*, 55 I. D. 189, 191. The establishment of the legal relationship resulting from the approved assignment is such a condition and therefore valid.[16]

Since the granting of oil and gas leases on Federal lands therefore is a matter within your discretion,[17] any regulation you adopt reasonably requiring lessees to conform to certain specifications and instructions designed to prevent waste and protect property, certainly will be sustained by the courts.[18]

2. Authority to withdraw lands

The exercise of administrative discretion, whether based on implied authority or on specific statutory authority, often can be a source of argument. However, there are well-founded principles to guide an executive or an administrative officer in the exercise of such discretion. Long ago the Supreme Court noted that we have no officers in this Government from the President down to the most subordinate agent who does not hold office under the law, with prescribed duties and limited authority.[19] However—

> a practical knowledge of the action of any one of the great departments of the government—

that Court also has said—

> must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government * * *.[20]

In this instance, however, statutory authority is not lacking. Section 1 of the Pickett Act of June 25, 1910,[21] authorized the President—

> * * * at any time in his discretion, temporarily [to] withdraw from settlement, location sale or entry any of the public lands of the United States, including * * * Alaska and reserve the same for water-power sites, irrigation, classification of lands, *or other public purposes to be specified in the orders of withdrawals*, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress. [Emphasis supplied.]

Three observations are pertinent at this point in connection with that language: (1) The reservation authority is not limitless, but must be exercised within the bounds of a "public purpose," or one of the specified purposes; (2) the temporal extent of any such reservation for a public purpose depends either on an administrative or a congressional revocation; (3) within general authority of law such as the

[16] 38 I. D. 712, 718 (1910). In this connection, see also *Shadeland* v. *U. S.*, 266 U. S. 226, 233 (1924).
[17] *U. S. ex rel. Jordan* v. *Ickes*, 55 F. Supp. 875 (1943), aff'd 143 F. 2d 182, cert. den. 320 U. S. 801 and 323 U. S. 733.
[18] *U. S.* v. *Grimaud*, 220 U. S. 506, 516 (1911); *Forbes* v. *U. S.*, 36 F. Supp. 131 (1940), aff'd 126 F. 2d 404 (1942), aff'd 317 U. S. 592 (1942).
[19] *The Floyd Acceptances*, 7 Wall. 666, 676-677 (1868).
[20] *U. S.* v. *Macdaniel*, 7 Pet. 1, 14-15 (1833).
[21] 36 Stat. 847, 43 U. S. C. 141.

McCormack Act of August 8, 1950,[32] the President can vest and has vested this statutory authority to withdraw or reserve lands in the Secretary of the Interior.[33]

On the general authority of the Secretary of the Interior to withdraw public lands, Acting Solicitor Cohen once said:

> The function of administering the public lands of the United States is conferred on the Secretary of the Interior by statute. Title 5, sec. 485, united States Code, provides:
>
> The Secretary of the Interior is charged with the supervision of public business relating to the following subjects [and agencies]:
>
> * * * [13] [P]ublic lands, including mines.
>
> Also see Title 43, secs. 2 and 1201, United States Code. This statutory authorization includes authority over "the acquisition of rights in the public lands and the general care of these lands." *Cameron* v. *United States*, 252 U. S. 450, 459; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324; *Knight* v. *U. S. Land Association*, 142 U. S. 161, 177, 181; *United States* v. *Schurz*, 102 U. S. 378, 395.
>
> * * * * * * *
>
> The courts have consistently adopted the view that the Secretary of the Interior is authorized to withdraw public lands. *Northern Pac. Ry. Co.* v. *Wismer*, 246 U. S. 283, 287; *Chicago, Mi. & St. P. Ry.* v. *United States*, 244 U. S. 351, 356, 357; *United States* v. *Morrison*, 240 U. S. 192, 212; *Wood* v. *Beach*, 156 U. S. 548, 550; *Riley* v. *Welles*, 154 U. S. 578; *Bullard* v. *Des Moines Railroad*, 122 U. S. 167, 172; *Wolsey* v. *Chapman*, 101 U. S. 755, 768–770; *Wolcott* v. *Des Moines*, 5 Wall. 681, 688; *Wilbur* v. *United States*, 46 F. (2d) 217, 219 (aff'd, 283 U. S., 414); *Stockley* v. *United States*, 271 Fed. 632 (rev'd on other grounds, 260 U. S. 532). All of these cases involved the validity of orders of withdrawal issued by the Secretary of the Interior. In each case the withdrawal was held valid on the ground that the act of the Secretary of the Interior was, in legal contemplation, the act of the President. This has also been the position previously taken by this Department. *Daniel P. Nolting*, A. 17134, January 28, 1933.[34]

The Acting Solicitor went further even insisting—

> * * * The President * * * has inherent power, apart from these statutes,[35] to make permanent reservations of public lands for Federal uses. Opinion of Attorney General to Secretary of the Interior, dated June 4, 1941 * * *.[36]

While it is unnecessary for you to claim or rely on any "inherent power" theory in this instance, it is of interest to note that the existence of such authority has been asserted in prior administrations.[37]

3. Congressional hearings

It has been suggested that the Public Lands Subcommittee of the Senate Committee on Interior and Insular Affairs may desire to hold hearings on this matter. The Legislative Reorganization Act of August 2, 1946,[38] "As an exercise of the rulemaking power of the Senate," has vested in the committee legislative jurisdiction over this subject.[39] Further, the legislative oversight provision (sec. 136) of that act authorizes that committee to conduct such studies and hearings and to propose such changes in the laws as it may deem necessary or proper.[40] These provisions are not substantive law but simply procedural rules and committee jurisdictional authorizations of the Senate.

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[32] 64 Stat. 419, now reenacted and codified as 3 U. S. C. 301 et seq.
[33] Ex. Ord. No. 10355, May 26, 1952, 17 F. R. 4831.
[34] 57 I. D. 231, 232-233 (1941).
[35] Referring to the act of June 25, 1910, 36 Stat. 847, 43 U. S. C. 141-143, as amended by the act of August 24, 1912, 37 Stat. 497.
[36] Ibid., p. 232.
[37] Cf. *Steel Seizure Case*, Youngstown v. Sawyer, 343 U. S. 579 (1952).
[38] 60 Stat. 812.
[39] See secs. 101 and 102.

Being simply procedural matters, they do not disparage your authority to exercise your judgment, as an officer in the executive branch, and promulgate regulations effectuating both statutory programs and protecting the public interest in each.

4. Conclusion

Withdrawals of public lands for national wildlife sanctuaries or refuges representing administrative action are only a part of essential national and international programs. They are, as I have shown, reasonable in scope and sound in law.

Harmonizing the objectives of the wildlife conservation program and the Mineral Leasing Act, in my opinion, represents effective administration as well as sound application of law.

ELMER F. BENNETT, *Solicitor.*

MEMORANDUM OF COMMITTEE COUNSEL RESPONSIVE TO SOLICITOR'S OPINION ON INTERIOR SECRETARY'S AUTHORITY RE FEDERAL WILDLIFE LANDS

U.S. SENATE,
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
January 26, 1959.

MEMORANDUM

To: Senator Joseph C. O'Mahoney.
From: Stewart French, Committee Counsel.
Subject: Solicitor's opinion on Interior Secretary's authority re Federal wildlife lands.

You have requested my comments on the Solicitor's opinion respecting the authority of the Secretary of the Interior to withdraw, at will, millions of acres of the lands of the United States and to suspend or modify the Mineral Leasing Act with respect to them. This opinion of the Solicitor has been formally published by the Department in 65 I. D. at page 305. Hence, it must be regarded as the Department's official position.

The Solicitor's opinion was a reply to a memorandum of law which I prepared on the subject transmitted by you, as chairman of the Public Lands Subcommittee, to the Secretary. This memorandum held:

1. That the Mineral Leasing Act, which was cited by the Secretary as authority for the above actions, did not in fact give such general powers; and

2. That no other act of Congress was found giving the Secretary any such general powers.

"Blank check" authority

The Solicitor's opinion affirms the "blank check" powers asserted and exercised by the Secretary. Cited by the Solicitor as authority are:

1. Section 17 as well as section 32 of the Mineral Leasing Act. (30 U. S. C., secs. 226 and 189, respectively.)

2. The Pickett Act (43 U. S. C. 141), and the statute establishing the Department of the Interior and setting forth its functions (5. U. S. C. 485).

3. Certain statutes respecting wildlife, in which the Congress set aside designated areas for a specific wildlife purpose, or took affirmative action for protection and propagation of wildlife.

4. Declarations of authority by former officers of the Department of the Interior.

5. Quotations from several court opinions.

Comments

1. The discretionary authority given the Secretary by section 17 to lease or not to lease is clearly governed by and subservient to the purpose and intent of the Mineral Leasing Act. As pointed out in the memorandum of law in connection with the Secretary's original reliance on section 32, the purpose and intent of the act is unequivocally set forth in its title and in section 1. The act is entitled: "An Act to promote the mining of coal, phosphate, oil, oil shale, gas and sodium on the public domain." Section 1 goes on to provide that—

> Deposits of * * * oil, oil shale or gas, and lands containing such deposits owned by the United States * * * *shall* be subject to disposition in the form and manner provided by this Act * * *.

Thus, the discretionary authority conferred by the act must be used in furtherance of the purposes of the act, namely, the *promotion* of the development of the mineral resources on the public domain.

It would appear highly questionable that discretion to lease in furtherance of the development of public mineral deposits, should be stretched to embrace authority to suspend the provisions of the act with respect to millions of acres of the public domain and to modify it, as the Secretary sees fit, with respect to millions of other acres.

2. The Pickett Act (43 U.S.C. 141) has been discussed in the memorandum. Briefly, enactment of the statute grew out of the proclamation of President Taft, of September 27, 1909, creating Teapot Dome, as a "temporary withdrawal in aid of proposed legislation affecting the use and disposition of the petroleum deposits of the public domain." The House committee report on the Pickett Act makes it clear that the purpose of that act also was "protecting and conserving public interest in valuable oil, coal, and other mineral land * * *" (H. Rept. 983, 61st Cong.). Nowhere in that report, or in reports on the 1912 amendment to the act, are fish and wildlife withdrawals even mentioned.

The statute establishing the Department of the Interior and the section charging the Secretary "with supervision of public business relating to * * * the public lands" has been interpreted by the Supreme Court as conferring administrative powers only (*U.S.* v. *George*, 228 U.S. 14).

In that case, the Secretary of the Interior had, by regulation, imposed an additional burden on homestead entrymen. In striking down the regulation, the Court held:

> * * * If the Secretary of the Interior may add by regulation one condition, may he not add another? If he may require a witness or witnesses in addition to what section 2291 requires, why not other conditions, and the disposition of the public lands thus be taken from the legislative branch of the Government and given to the discretion of the Land Department? It is not an adequate answer to say that the regulation must be reasonable. The power to make it is expressed in general terms. If given at all it is as broad as its subject and may vary with the occupant of the office. This is to make conditions of title, not to regulate those constituted by the statute.

It is submitted that this reasoning by the highest court in our land is peculiarly apposite in the present situation in which the Secretary has modified or suspended an act of Congress with respect to millions of acres of public lands by administrative regulations.

3. As noted the statutes cited by the Solicitor are specific acts of Congress for designated and limited wildlife purposes. They cannot be stretched to confer the general powers with respect to suspension or modification of the Mineral Leasing Act which are asserted and exercised.

4. As to declaration of authority by former officials of the Department, it is respectfully submitted that (*a*) such declarations are self-serving, and (*b*), they highlight and emphasize the fact that Congress has never delegated to the Secretary the broad general powers he is exercising. Otherwise, there would be no need to rely on such declarations.

5. The Solicitor's opinion quotes at some length, comparatively, an extract from *Chapman* v. *Sheridan-Wyoming Co.* (338 U.S. 621). In this case, a lessee of coal lands sought to prevent the Secretary from issuing a lease on other lands in the same sales area to a competitor, pleading a regulation or instruction of the Secretary from NRA days designed to limit overproduction. The Court denied the applicant's contention that the regulation could override the purpose of the law and upheld the Secretary's authority to issue the lease.

In words that appear highly apposite to the problem with which we are dealing here, the Court said, in interpreting the Mineral Leasing Act:

"Its (the Act's) whole policy seems to contemplate the *opening of the public domain* to competitive exploitation" [emphasis supplied] (338 U.S. 628).

It is submitted that neither the holding nor the reasoning of the Sheridan-Wyoming case can legitimately be cited as authority for *actions which close* the public domain by administrative fiat.

In *U.S.* v. *Wilbur* (283 U.S. 414), an applicant brought an action for a writ of mandamus to compel the Secretary to issue a prospecting permit. The Court found as fact that the Secretary's rejection of the application was "in order to effectuate the conservation policy of the President" (p. 418). From the context, it is indisputable that the "conservation" that was the basis of the Secretary's action was conservation of oil and gas.

The Court, in refusing to grant mandamus against the Secretary, further found:

It (the Mineral Leasing Act) was passed when according to a widely accepted view decline of petroleum production in the United States was imminent. In fact, there has been an enormous increase and a consequent troublesome surplus. Looking only at its words, one may interpret section 13 as the Secretary says he did (p. 419).

This case was decided in 1931, and the Court patently took judicial notice of economic conditions.

In the Grimaud case (*U.S.* v. *Grimaud*, 220 U.S. 506) an indictment for grazing sheep on a national forest reserve without the permission required by regulations adopted by the Secretary of Agriculture was challenged. The Court, in sustaining the indictment, made much of the fact that the purpose of the regulations was to further the purposes

of the acts of Congress, namely the improvement and protection of the national forests. The Court's opinion stated:

> None of these statutes (id est, authorizations to make rules and regulations) could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions "power to fill up the details * * *."

It is submitted that the suspension or modification of the Mineral Leasing Act on millions of acres of public domain lands is something more than an exercise of "power to fill up the details" conferred either by the leasing act, the withdrawal act, or, from the aspect of general authority exercised generally, of any of the wildlife statutes.

Challenge of comittee's powers

The Solicitor's opinion, under the subheading "congressional hearings," raises the question of the subcommittee's powers. The opinion states that the Legislative Reorganization Act "as an exercise of the rulemaking power of the Senate" confers on the committee *legislative* jurisdiction (emphasis that of the Solicitor). The provision of the act authorizing studies, hearings and the proposing of changes in the laws are described as—

> Not substantive law but simply procedural rules and committee jurisdictional authorizations of the Senate.

The purpose of this inferential challenge to the committee's official interest is not clear to me. However, in addition to sections 101 and 102, cited by the Solicitor, I would like to call attention to section 134(a). This section, in pertinent part, provides as follows:

> Each standing committee of the Senate, including any subcommittee of any such committee, is authorized to hold such hearings, to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Senate, to require by subpena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to take such testimony and to make such expenditures (not in excess of $10,000 for each committee during any Congress) as it deems advisable. Each such committee may make investigations into any matter within its jurisdiction, may report such hearings as may be had by it. * * *

It is submitted that this is a delegation by the Congress of certain of its own powers to its duly appointed committees, and is something more than an exercise, merely, of "rulemaking power."

Conclusion

It is respectfully submitted that the Solicitor's opinion does not answer the very grave question of when and where Congress has delegated or conferred the very great, very broad powers asserted. It might well be that such such powers are desirable with respect to wildlife conservation, and even necessary.

However, this problem should be met squarely, by legislation, and not by recourse to administrative interpretation of statutes and decisions, the clear purposes of which are in direct opposition to the asserted powers.

STEWART FRENCH,
Chief Counsel,
Committee on Interior and Insular Affairs.

○

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 838

BERT F. DUESING, PETITIONER

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The court of appeals' opinion (Pet. App. 1–9) is reported at 350 F. 2d 748.

JURISDICTION

The judgment below was entered on June 30, 1965 (Pet. App. 10), and a petition for rehearing *en banc* was denied on September 23, 1965 (Pet. App. 10). The petition for a writ of certiorari was filed on December 21, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Interior properly exercised authority under the Mineral Leasing Act in

706-496—66

issuing a regulation closing half of a wildlife reserve to oil and gas leases.

STATEMENT

In August 1957, petitioner filed an application for oil and gas leases on various tracts in the Kenai National Moose Range, which had been established in December 1941 as a wildlife preserve in Alaska by Executive Order No. 8979 (6 Fed. Reg. 6471). Final action on such applications had been suspended since February 1956 because the advisability of leasing such areas for oil and gas production was then under consideration by the Department of the Interior and the House Committee on Merchant Marine and Fisheries (J.A. 40).[1] In October 1957, notice was published in the Federal Register (22 Fed. Reg. 8088) that all or part of the Alaska wildlife areas might be closed to leasing. Public hearings on this matter were held in December 1957 (J.A. 40). On January 10, 1958, the Secretary of the Interior amended 43 C.F.R. 192.9 to provide that "[a]ll pending offers or applications * * * for oil and gas covering * * * Alaska wildlife areas, will continue to be suspended until" approval by the Secretary of an agreement between the Fish and Wildlife Service and the Bureau of Land Management "specifying those lands which shall not be subject to oil and gas leases" (J.A. 17).

On July 24, 1958, the Secretary approved an agreement whereby the southern half of the Kenai National Moose Range was "closed to oil and gas leasing because such activities would be incompatible with

[1] "J.A." refers to the joint appendix in the court of appeals.

management thereof for wildlife purposes" (J.A. 18). The tracts for which petitioner had applied were in the southern half of the range. Petitioner's applications were consequently rejected (J.A. 28–44). Petitioner thereupon instituted these proceedings to review the Secretary's determination (J.A. 2–9). The district court granted summary judgment for the Secretary (J.A. 58), and the court of appeals affirmed.

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with decisions of other courts of appeals or with any decision of this Court. There is, therefore, no need for further review.

1. Petitioner's initial contention is that the Mineral Leasing Act of 1920, as amended, 30 U.S.C. 181 *et seq.*, empowered the Secretary of the Interior to deny mineral leases on an individual tract basis but not to issue a regulation closing a group of tracts to leasing (Pet. 8–9). This construction of the statute is unsound because it denies the Secretary the power to exercise efficiently the discretion conferred upon him by the Act. If the same considerations which the Secretary deems controlling with respect to a single tract—such as, for example, that oil and gas development could be "incompatible with management thereof for wild life purposes" (J.A. 18)—apply to a group of tracts, it is surely permissible for him to issue a general notice to that effect rather than denying applications individually. The language quoted by petitioner from this Court's opinion in *Udall* v. *Tallman*, 380 U.S. 1, is not inconsistent with this view. By recognizing the

Secretary's power to act with respect to a "given tract" (380 U.S. at 4), this Court did not necessarily imply an absence of power to deny applications for a group of tracts.

Nor is there substance to the claim that the range's status was being changed and that this could be done only by a "public land order" (compare 380 U.S. at 9-10). As the court below noted (Pet. App. 5-6), the Secretary was acting here entirely under his discretionary power to deny leases. Hence the procedures prescribed for the exercise of a "withdrawal power" were inappropriate.

2. Petitioner's remaining arguments are unsound. The regulations involved here merely gave applicants notice of the grounds upon which the Secretary would, in the future, deny oil and gas leases in a portion of the Kenai Moose Range. The Secretary has always construed this power as distinct from the power to "withdraw" public lands (see Pet. App. 6), and this consistent and reasonable administrative practice is entitled to great deference. *Udall* v. *Tallman*, 380 U.S. 1, 16-17. In exercising the power to deny leases, the Secretary was not, as petitioner contends (Pet. 17-19), doing what Congress had failed to authorize since he was not withdrawing the land from leasing. And assuming, *arguendo*, that notice and hearing were required before a regulation such as the one involved here was put into effect (Pet. 16-17), interested parties had a full opportunity to present their views in December 1957, when it was clearly stated that all or part of the Alaska wildlife areas might be closed

to leasing (see p. 2, *supra*). Finally, the statements made by a single Senator in 1958 (Pet. 19–22) were properly dismissed by the court below as "no part of the legislative history of the Mineral Leasing Act, passed in 1920 and amended through 1946" (Pet. App. 7). In enacting further legislation in 1960, Congress left the Secretary's authority unchanged despite the objections previously voiced.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

EDWIN L. WEISL, JR.,
Assistant Attorney General.

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Attorneys.

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